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° ADMITTED IN PENNSYLVANIA ONLY

June 8, 1995

EX PARTE OR LATE FILED

JUN - 8 1995

Via Hand Delivery

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20054

Re: **Ex Parte Presentation**
MM Docket No. 92-266

Dear Mr. Caton:

On behalf of Continental Cablevision, and pursuant to Section 1.1206 of the Commission's rules, enclosed are two copies of a written ex parte communication submitted today in connection with Continental's Petition For Reconsideration with respect to leased access in the above-referenced docket.

If you should have any questions concerning this, please contact me.

Very truly yours,

James F. Ireland

James F. Ireland

28478.1

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° ADMITTED IN PENNSYLVANIA ONLY

June 8, 1995

Via Hand Delivery

Kathy Franco
Federal Communications Commission
2033 M Street, NW
Room 705-B
Washington, D.C. 20554

Dear Ms. Franco:

Attached for your information is a copy of an Opinion and Order issued by the United States District Court for the Eastern District of Virginia (Norfolk Division) that is relevant to the reconsideration proceeding on leased access. Specifically, the Court holds on page 8 that the leased access provisions of the Cable Act "have no application to commercial advertising." This holding supports Continental's position expressed both in its Petition and its July 11, 1994 Ex Parte Comments (p. 12-13).

Should you have any questions regarding this, please contact me.

Very truly yours,

James F. Ireland

James F. Ireland

cc: Howard Homonoff (w/encl.)
Mary McLaughlin (w/encl.)

28480.1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

MICHAEL SHANE SOFER, etc.

Plaintiff,

v. ACTION NO. 2:94cv1182

THE UNITED STATES OF AMERICA,
CITY OF CHESAPEAKE, VIRGINIA,
FEDERAL COMMUNICATIONS COMMISSION,
AND TCI OF VIRGINIA, INC.,
JAN L. PROCTOR,
STEPHEN E. NOONA,

Defendants.

OPINION AND ORDER

Plaintiff, Michael Shane Sofer, proceeding pro se, brings this action to redress alleged violations of statutory and constitutional rights. Specifically, plaintiff claims Defendant TCI of Virginia refused to sell commercial advertising time on a cable television system operated in the City of Chesapeake by Defendant TCI of Virginia, and that such refusal constitutes a violation of his statutory, constitutional, and civil rights. Plaintiff seeks injunctive relief and monetary damages against the United States, the Federal Communications Commission ("FCC"), the City of Chesapeake ("Chesapeake"), and TCI of Virginia ("TCI").

Factual and Procedural History

On October 26, 1994, plaintiff discussed with Defendant TCI the purchase of commercial programming time on TCI's cable system. After reviewing the proposed advertisement, TCI refused to accept the advertisement worded as follows:

BULLETIN
MESSIAH IS HERE!
RAPTURE IS ON!
call for facts
1-900-???-????
$1.99/min., must be 18

Within several days of the denial, plaintiff complained to the FCC, at which time an FCC representative participated in a three-way conference call among the FCC, plaintiff, and TCI. TCI's advertising manager stated to plaintiff and to the FCC that TCI had full editorial discretion to reject any paid commercial advertisement, with or without a stated reason. The FCC representative concurred. Plaintiff then contacted Chesapeake's Assistant City Manager, who confirmed TCI's right to reject commercial advertising and stated that TCI had not acted improperly when it declined to carry plaintiff's commercial. Plaintiff alleges that the FCC has responded to his further complaints by informing him they have no power to help him redress his grievance, and directing him to take his complaint to the City of Chesapeake management.

This Complaint was filed on December 12, 1994, naming the United States, the FCC, TCI, and Chesapeake as Defendants. On January 10, 1995, plaintiff filed a motion to add Attorneys Noona and Proctor as defendants.

Plaintiff's complaints against attorneys Noona and Proctor arise out of filings that had typographical errors. Both attorneys misaddressed service copies to plaintiff at P. O. Box 894 rather than P. O. Box 804, Moyock, N.C., and in summarizing the claims made by plaintiff, both attorneys referenced 47 U.S.C. § 539 instead of 47 U.S.C. § 532.

On January 31, 1995, plaintiff filed a motion to add the United Nations, the Roman Catholic Church, Pope John Paul II, and former United States President George Bush as defendants. This pleading added no new factual or legal allegations. It failed to state how any of the above parties are related to the original Complaint. Accordingly, the motion is DENIED.

The United States and the FCC have moved to dismiss the Complaint for lack of subject matter jurisdiction on the ground that primary jurisdiction over this case lies in the FCC. The United States, the FCC, TCI, Chesapeake, Proctor, and Noona have moved to dismiss this Complaint for failure to state a claim upon which relief can be granted, or in the alternative, for summary judgment.

Discussion

A court may grant summary judgment if it determines, viewing the facts in the light most favorable to the nonmoving party, that the record contains no genuine issue of material fact and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

250 (1986). If there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law, then the case may be summarily dismissed. Kotmair v. Gray, 505 F.2d 744, 746 (4th Cir. 1974); Bland v. Norfolk & Southern R.R. Co., 406 F.2d 863, 866 (4th Cir. 1969).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal when the court finds the allegations of the complaint are not legally sufficient as a matter of law. Plaintiff's allegations are taken as true and the record as a whole is viewed in the light most favorable to the plaintiff; however, if a plaintiff has failed to allege any set of facts upon which relief can be granted, a complaint may be dismissed. Schatz v. Rosenberg, 943 F.2d 485, 498 (4th Cir. 1991), cert. denied sub nom. Schatz v. Weinberg and Green, 503 U.S. 936 (1992); Battlefield Builders, Inc. v. Swango, 743 F.2d 1060, 1062 (4th Cir. 1984).

A. Statutory Claims

1. The Communications Act

Plaintiff's Complaint alleges violations of various "fairness" provisions under the Communications Act. Under the "fairness doctrine," the FCC required broadcast media licensees to provide coverage of vitally important controversial issues of interest in the community served by the licensee and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues. Report Concerning the General

Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 146 (1985). However, the fairness doctrine did not operate to compel a broadcaster to accept editorial advertising. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). Even if it did, the fairness doctrine was abolished by the FCC in 1987. In re Complaint of Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.Rcd. 5043 (1987), aff'd sub nom. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert denied, 100 S.Ct. 717 (1990) (fairness doctrine abolished on the grounds that it no longer served public interest and violated the First Amendment). Furthermore, even before the Commission ruled the doctrine was no longer enforceable, the FCC had withdrawn the doctrine from the field of commercial advertising. Fairness Doctrine and Public Interest Standards, 48 F.C.C.2d 1, 22-28 (1974), aff'd. Nat'l Citizens Comm. for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), cert. denied, 436 U.S. 926 (1978).

Plaintiff acknowledges that the fairness doctrine has been abolished, but argues that the "equal access" and "equal time" provisions of section 315 of the Communications Act, 47 U.S.C. § 315, are still intact and apply to him. This Court finds that argument unpersuasive. Section 315 deals with facilities for candidates for public office and requires that political candidates be given the opportunity to purchase an equal amount of time in roughly comparable time periods once an opponent has appeared on a given station's broadcasts. Even by the broadest

stretch of the imagination, plaintiff's Complaint alleges no facts indicating he was a political candidate, or that his request to purchase advertising time was in any way in response to the appearance of an opposing political candidate. Therefore, section 315 does not afford plaintiff any relief.

Even if Plaintiff satisfied the Court that he was a political candidate, this Court would not have jurisdiction over his claim. The purpose of the 1934 Communications Act "was to protect the public interest in communications," Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942), by formulating "a unified and comprehensive regulatory system for the industry." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940). In furtherance of these goals, Congress created the FCC and granted it broad regulatory authority. 47 U.S.C.A. § 151. The role of the courts was limited to review and enforcement of FCC decisions and orders under an abuse of discretion standard, FCC v. RCA Communications, Inc., 346 U.S. 86, 91 (1953); to the issuance of writs of mandamus in certain situations; and to the prosecution of criminal violations of the Act. 47 U.S.C.A. §§ 401 and 402. Though the Act has been amended on several occasions since 1934, these amendments have not diminished the central role of the FCC in enforcing the Act or its attendant powers. Enforcement of the statute and vindication of the public interest are clearly vested in the FCC. See Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497 (1st Cir. 1950); McIntire v.

Wm. Penn Broadcasting Co. of Philadelphia, 151 F.2d 597, 600 (3d Cir. 1945), cert. denied, 327 U.S. 779 (1946).

Plaintiff's Complaint indicates he was dissatisfied with the results of his call to the FCC; however, he failed to file a complaint with the FCC and failed to pursue any other administrative remedies available to him. Until he does so, this Court has no jurisdiction over plaintiff's claim for injunctive relief under the Communications Act. Accordingly, those claims are DISMISSED.

Plaintiff's request for monetary damages against the government must also fail for lack of jurisdiction. The Federal Communications Act does not expressly authorize suits to recover damages for violations of section 315. A majority of courts have held no such remedy can be inferred from the Act. Belluso v. Turner Communications Corp., 633 F.2d 393 (5th Cir. 1980). This Court finds the reasoning in Belluso persuasive. Thus even if plaintiff could show he fit into the category of protected political candidates under section 315(a), there is no private cause of action for damages to redress violations of section 315(a). Therefore, plaintiff's claim for monetary damages against the government is DISMISSED without prejudice.

2. The Cable Act

Plaintiff alleges violations of section 612 of the Cable Act, 47 U.S.C. § 532, and related regulations (47 C.F.R. § 76.971). Compl. at 2, ¶¶ A, E, and F. Section 532 requires

cable operators to set aside a portion of channel capacity for lease by competing programmers. The purpose is "to promote competition in the delivery of diverse sources of video programming." Section 532(a). Related regulations, set out at 47 C.F.R. §§ 76.971-76.977 establish a formula for calculating the lease value of a channel for leased access programming, encourage negotiation on terms and conditions for program carriage, and provide a procedure for dispute resolution. These provisions have no application to commercial advertising; therefore, the leased access provision of the Cable Act and related regulations do not provide a basis for relief.

3. Antitrust Laws

Plaintiff alleges violations of federal antitrust laws, specifically Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 26 of the Clayton Act, 15 U.S.C. § 26. Compl. at 2, ¶¶ G and H.

Section 2 of the Sherman Act prohibits restraint of trade through monopolization, attempt to monopolize, and conspiracy to monopolize. Section 2 requires an allegation that plaintiff and defendant are competitors. Also essential to a claim under Section 2 is an area of effective competition. In order to demonstrate an area of effective competition, plaintiff must establish a competitive relationship between plaintiff and defendant. Where plaintiff has failed to establish the existence of such a relationship, the antitrust claim must fail. See Ad-

Vantage Tel. Directory Consultants v. GTE Directories, 849 F.2d 1336, 1348 (11th Cir. 1987) (rejecting plaintiff's claim because plaintiff did not compete in market in which defendant had monopoly power).

Plaintiff has failed to allege that plaintiff and defendant are competitors. Even if he had, there is no indication that there is an area of effective competition. Nor is there any indication that there was a conspiracy between Defendants TCI and Chesapeake based on the confirmation of TCI's full editorial discretion by Chesapeake Assistant City Manager. Thus plaintiff's claim under Section 2 must fail. See Reynolds Metals Co. v. Columbia Gas Sys., Inc., 669 F.Supp. 744, 750 (E.D.Va. 1987) (dismissing complaint that merely made broad allegations of anticompetitive behavior without factual support).

B. First Amendment Claim

Plaintiff's Complaint against TCI and Chesapeake is based upon the undisputed fact that he attempted to purchase commercial advertising time on the cable television system operated in Chesapeake by TCI and that TCI's advertising manager declined to sell advertising time to plaintiff after reviewing the advertisement. Plaintiff's Complaint against the United States and the FCC is based upon the FCC's inaction following his telephone call regarding TCI's refusal to sell him advertising time.

The First Amendment is a restraint on government, not on private persons. Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952). Although the rule is clear, the distinction between "private" action and "state" action is not. Both the fact that TCI was granted a franchise by the City of Chesapeake, and the fact that the FCC has extended power to control broadcasting implicate state action. However, the weight of facts and circumstances are the only measure of the existence of state action in a particular case. Evans v. Newton, 382 U.S. 296, 299-300 (1966). Here, the facts and circumstances weigh against finding state action.

Most lower courts considering the question whether broadcasters are instrumentalities of the Government for First Amendment purposes have concluded they are not. Belluso v. Turner Communications Corp., 633 F.2d 393 (5th Cir. 1980) (citations omitted). This Court reaches the same conclusion here. The existence of regulations does not transform a regulated entity into a Government instrumentality. Id. at 399. Thus the fact that TCI is regulated by the FCC is not enough to transform TCI's refusal into government action. Even if an FCC representative concurred with TCI's decision, that action is not enough to transform TCI's refusal into government action. If, as plaintiff alleges, an FCC representative informed plaintiff that TCI had a right to refuse advertising, that statement would not be a final decision constituting FCC approval given the fact that plaintiff was not following the proper channels to log a

complaint with the FCC. Nor will the Court impute power Chesapeake to regulate TCI's decisions regarding advertising. The fact that a member of Chesapeake government told plaintiff TCI had a right to refuse advertising is not dispositive. There is nothing to suggest that Chesapeake had any authority to regulate TCI's advertising decisions. Plaintiff has not pointed to any part of the franchise agreement that would support the suggestion that Chesapeake retained any control over TCI's programming, nor can the Court find support for that suggestion. Absent any indication of control, the actions of TCI cannot be attributed to Chesapeake.

Where there is no government action, the First Amendment will not afford plaintiff any relief against TCI. The First Amendment does not require TCI to sell commercial time to persons. See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). Thus plaintiff has failed to allege a violation of his constitutional rights based on TCI's decision.

C. Civil Rights Claims

Plaintiff's Complaint also refers to various civil rights laws, specifically 42 U.S.C. sections 1983, 1984, and 1985, and the Civil Rights Act of 1964. Compl. at 2, ¶¶ I and J. Section 1984 was repealed by Act of June 25, 1948, c. 645, § 21, 62 Stat. 862. See Historical Note to Section 1984, 42 U.S.C. § 1984.

Accordingly, plaintiff's claims under this section are without merit.

Plaintiff's claims under section 1983 and 1985 also must fail. These sections are remedial in nature and do not of themselves provide substantive constitutional or statutory rights, but instead serve as a vehicle through which existing constitutional rights may be vindicated. Albright v. Oliver, 114 S.Ct. 807, 811 (1994); Great American Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979). As discussed above, plaintiff had no constitutional or statutory right to purchase advertising time on TCI's cable system. Thus there is no substantive right to be vindicated here. Further, with respect to his section 1985 claim, plaintiff has made no credible allegations of conspiracy. See Griffin v. Breckenridge, 403 U.S. 88, 92 (1971) (conspiracy is an essential element of a section 1985 claim); Buschi v. Kirven, 775 F.2d 1240 (4th Cir. 1985) (stating "mere allegations of conspiracy, backed up by no factual showing of participation in a conspiracy, are insufficient." Id. at 1248).

Finally, plaintiff has failed to state a claim under the Civil Rights Act of 1964. The Civil Rights Act of 1964 contained ten titles, providing relief from various forms of discrimination taking place in a variety of fora. The Complaint fails to state the title on which he is relying, probably because none of them addresses the factual situation at issue here. Although this Court must construe plaintiff's pro se complaint liberally, there

is nothing contained in the Civil Rights Act of 1964 on which to base a cause of action given plaintiff's alleged facts.

E. Attorneys Noona and Proctor

Plaintiff's Complaint against attorneys Noona and Proctor arises out of filings that had typographical errors. This Court finds no merit in plaintiff's claims against them. Accordingly, the Complaint as to them is DISMISSED.

Summary

Plaintiff's motion to add the United Nations, the Roman Catholic Church, Pope John Paul II, and former United States President George Bush as additional defendants is DENIED.

Defendants Noona and Proctor's Motion to Dismiss for failure to state a claim upon which relief can be granted is GRANTED.

The Motions for Summary Judgment submitted by the United States, the FCC, the City of Chesapeake, and TCI are GRANTED.

The clerk is REQUESTED to send a copy of this order to plaintiff and counsel for defendants.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
June 7th, 1995